

Judgment No 516 of 2020

Justice of the Peace of Frosinone

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07/15/2020

The Justice of the Peace of Frosinone annulled a sanction issued during the quarantine period for illegality of the decrees on COVID19.



Justice of the Peace of Frosinone, sentence 15 - 29 July 2020, n. 516

At the hearing of 15.7.2020, the Justice of the Peace, Mr Emilio Manganiello, designated as Justice of the Peace, pronounced the following ruling

JUDGMENT

in the process recorded in the Register of Civil Procedure No. 819/2020

between

XXXXXXXXXXXXXXXXX represented and defended by Mr. YYYYYYYYYYYY in whose office in Frosinone he is electively domiciled

-opponent-

Prefect of ZZZZZZZZZZZ

-observed in absentia-

Subject: Opposition to administrative sanction - SPV Pol.Str. Frosinone No 700016396274 of 11.4.2020

Conclusions: as in deeds.

Process

By application, promptly lodged and subsequently notified, the applicant objected to the act referred to in the subject-matter, by which he was accused of violating the travel restrictions which came into force as a result of the health emergency as per the unspecified Prime Minister's Decree.

The opposing body did not join the proceeding and the case was decided in accordance with a separate provision, read at the hearing.

Reasons for the decision

The appeal is well founded and must therefore be accepted.

(A) ON THE UNLAWFULNESS' OF THE DECLARATION OF A STATE OF EMERGENCY FOR BREACH OF ARTICLES 95 AND 78 COST. AND THE SUBSEQUENT DPCM.

By resolution of 31.1.2020, published in the Official Gazette General Series no. 26 of 1.2.2020, the Council of Ministers of the Italian Republic, declared a state of national emergency as a result of the health risk arising from transmissible viral agents "according to and for the purposes of Article 7, paragraph 1, letter c) and Article 24, paragraph 1, of Legislative Decree no. 2 January 2018. 1, a state of emergency is declared for six months from the date of this act, as a result of the health risk associated with the onset of pathologies deriving from transmissible viral agents; 2) for the implementation of the interventions referred to in Article 25, paragraph 2, letters a) and b) ...". If one examines the articles referred to in the above mentioned resolution, one can note that there is no reference to situations of "health risk" and surely not to "viral agents".

In fact, Article 7, paragraph 1, letter c) of Legislative Decree no. 1/18 states that "civil protection emergencies are classified as follows: ... c) emergencies of national importance associated with natural or man-made disasters". These are natural disasters, i.e. earthquakes; avalanches; floods, fires and others; or deriving from human activity, i.e. spills, polluting human activities and others. But none of the cases referred to in Article 7, paragraph 1, letter c), of Legislative Decree no. 1/18 can be attributed to "health risks". It must be added that the fathers of our constitution have provided only one hypothetical situation in which the Government can assume peculiar normative powers, and it is the one provided for and regulated by Article 78 and Article 87 relative to the declaration of the state of war. There is no reference in the Italian Constitution to any hypothetical declaration of a state of emergency on the basis of health risk and, as we have seen, not even in Legislative Decree no. 1/18. As a consequence, the declaration adopted by the

Council of Ministers on 31.1.2020 is illegitimate, because it was issued in the absence of the legislative prerequisites, since no constitutional source or one having the force of ordinary law gives the power to the Council of Ministers to declare a state of emergency due to health risk. Therefore, since administrative acts (including those of High Administration) such as the declaration of a state of emergency, are subject to the principle of legality, the resolution of the Council of Ministers of 31.1.2020 is illegitimate because it was issued in the absence of the relevant powers by the CoM in violation of articles 95 and 78, which do not provide the CoM. of the Republic of Italy with any power to declare a state of health emergency. The consequence of this is the illegality of all the subsequent administrative acts, such as the Prime Minister's Decree invoked by the sanction herein, with the consequent duty of the Justice of the Peace, as ordinary Judge, to disapply the declaration of a state of health emergency and the executive Prime Minister's Decree as per article 5 of Law no. 2248 of 1865 All.

2. In addition, we must also take into account the authoritative constitutional doctrine (S. Cassese) according to which the provision through Prime Minister's decrees of general and abstract norms which in any case limit fundamental constitutional rights is contrary to the Constitution. In particular, the thesis of those who support the legitimacy of such provisions by arguing that administrative acts such as the Prime Minister's decrees have the full force of law and can be equated to the legislative source, thus avoiding their nullity and the consequent disapplication by the Ordinary Judge, does not appear worthy of acceptance. In fact, the last Prime Ministerial Decree issued on 26.4.2020, would derive its effectiveness from Decree-Law no. 19 of 25.3.2020, as well as the administrative acts of the Lazio Region. This thesis, however, is inapplicable to the Prime Ministerial Decree that is the subject of this case, since it was issued prior to 26.4.2020. In any case, the delegated legislative function is governed by article 76 of the Italian Constitution, which, by stating that "the exercise of the legislative function cannot be delegated to the Government except by determining principles and guiding criteria", also provides that the function of laying down abstract general rules cannot be delegated to any institutional body other than the Government, intended in its collective composition, and therefore prohibits the sole President of the Council of Ministers from legitimately issuing rules equivalent to those

issued in acts having the force of law. In conclusion, only a legislative decree, issued in strict compliance with an enabling act, can contain rules having the force of law. This however cannot be the case with an administrative act such as the Trade Union or Regional Ordinances or the Prime Minister's Decree, even if issued on the basis of a delegation granted by a decree law promptly converted into law. Hence the illegality of the provisions of the Prime Ministerial Decree of 26.4.2020, in OJ of 27.4.2020, no. 108.

B) THE ILLEGALITY' OF THE DPCM FOR VIOLATION OF ARTICLE 13 COST.

In any case, the indisputable illegitimacy of the Prime Ministerial Decree of 9.3.2020 must be noted when it provides that "1. In order to counter and contain the spread of the COVID-19 virus, the measures referred to in article 1 of the Prime Ministerial Decree of 8.3.2020 are extended to the entire national territory", together with the illegitimacy of Prime Ministerial Decree of 8. 3.2020, when it states that "Art. 1 Urgent measures to contain the contagion in the Lombardy region and in the provinces of Modena, Parma, Piacenza, Reggio nell'Emilia, Rimini, Pesaro and Urbino, Alessandria, Asti, Novara, Verbano-Cusio-Ossola, Vercelli, Padua, Treviso, Venice.

1. In order to counter and contain the spread of the virus" COVID-19 in the region of Lombardy and in the provinces of Modena, Parma, Piacenza, Reggio nell'Emilia, Rimini, Pesaro and Urbino, Alessandria, Asti, Novara, Verbano-Cusio-Ossola, Vercelli, Padua, Treviso and Venice, the following measures are taken:

(a) to avoid any movement of natural persons into and out of the territories referred to in this Article, as well as within those territories, except for movements motivated by proven occupational needs or other situations of need and movements for health reasons'.

This provision, establishing a general and absolute prohibition to move outside one's own home, with limited and specific exceptions, constitutes a real obligation to stay at home. However, in our penal legal system, the obligation to stay at home is already known and consists of a criminal sanction restricting personal freedom which is imposed by the Justice of the Peace for certain crimes. It is certainly undisputed in the case-law that the obligation to remain at home constitutes a measure restricting personal freedom.

Moreover, other measures that are much less severe than the obligation to remain at home, such as, for example, the collection of a "blood sample" have been evaluated by the the Constitutional Court as measures restricting personal freedom(Judgment no. 238 of

1996). Also the compulsory accompaniment to the frontier of foreigners was considered a measure restrictive of personal freedom and the legislative discipline which did not provide for the control of the ordinary Judge on the measure subsequently introduced by the Legislator in execution of the decision of the Constitutional Court was declared illegitimate from a constitutional standpoint: in fact, Art. 13 of the Constitution, establishes that any measures restricting personal freedoms can be adopted only upon a motivated act of the judicial authority. Therefore, in our system, not even a law could provide the obligation to stay at home, directly imposed on all citizens by the legislator rather than by the judicial authority with a motivated act, without violating the aforementioned Art. 13 of the Constitution. Moreover, in this case, since it is a Prime Minister's Decree, i.e. an administrative act, this Judge must not refer the question of constitutional legitimacy to the Constitutional Court, but must proceed to disapply the illegal administrative act for breach of the law. Finally, he can't approve the extreme attempt of those who support the constitutional conformity of the obligation to stay at home by arguing that the Prime Minister's Decree is in conformity with the Constitution since it provides for legitimate limitations of freedom of movement under Article 16 of the Constitution and not of personal freedom. In fact, as the Constitutional Court has clarified, freedom of movement concerns the limits of access to certain places, such as, for example, the affirmed prohibition of access to certain limited areas which might be infected, but it can never entail an obligation to remain at home (Court of Justice, no. 68 of 1964). As a matter of fact, freedom of movement cannot be confused with personal freedom: the limits to freedom of movement relate to specific places to which access may be precluded because, for example, they are dangerous; when, on the other hand, the prohibition of movement does not relate to places, but to persons, then the restriction is a restriction of personal freedom. Certainly, when the travel prohibition is absolute, as in the present case, in which it is provided that the citizen cannot go anywhere outside his own home, it is indisputable that it is a clear and illegitimate limitation of personal freedom, because, in the Italian legal system, the order to remain in one's own home cannot be imposed by the legislator, but only by the Judicial Authority with a motivated act. Moreover, such illegitimate public health measures contained in the DPCM are modelled upon those adopted in non-democratic

states such as China, which have authoritarian constitutional systems that are legally incompatible with our own. Our constitutional system is based upon inviolable guarantees for the individual that are unknown to other authoritarian systems and apparently also to health experts from those country and from our own, no one of them being competent in constitutional law.

In conclusion, this Judge must affirm the illegality of the Prime Minister's Decree invoked in the sanction herein cited for violation of article 13 of the Constitution, with the consequent duty of the Justice of the Peace, as ordinary judge, to disapply this Prime Minister's Decree as per article 5 of Law no. 2248 of 1865, annex E.

The novelty of the dispute and the failure by the opposing body to join the proceedings justify the compensation of expenses.

P.Q.M.

The Justice of the Peace,

Having regard to Article 23 of Law No 689/1981, definitively pronouncing - each different request and exception rejected, disregarded or absorbed - so provides:

upholds the action and, accordingly, annuls the opposite act with compensation for costs.